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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/720,382	03/07/2001	Reynolds Paul Ross	681353342002	2369

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EXAMINER
HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 06/11/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action	Application No. 09/720,382	Applicant(s) ROSS ET AL.	
	Examiner Keith Hendricks	Art Unit 1761	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 May 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

a) ☐ The period for reply expires _____months from the mailing date of the final rejection.

b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1.☒ A Notice of Appeal was filed on *22 May 2003*. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.

2.☐ The proposed amendment(s) will not be entered because:

(a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);

(b) ☐ they raise the issue of new matter (see Note below);

(c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or

(d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____.

3.☒ Applicant's reply has overcome the following rejection(s): See Continuation Sheet.

4.☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

5.☒ The a)☐ affidavit, b)☐ exhibit, or c)☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: *see attached sheet*.

6.☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.

7.☒ For purposes of Appeal, the proposed amendment(s) a)☐ will not be entered or b)☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: *none*.

Claim(s) objected to: *none*.

Claim(s) rejected: *1-9 and 11-15*.

Claim(s) withdrawn from consideration: *none*.

8.☐ The proposed drawing correction filed on _____ is a)☐ approved or b)☐ disapproved by the Examiner.

9.☐ Note the attached Information Disclosure Statement(s)(PTO-1449) Paper No(s). _____.

10.☐ Other: _____

Continuation of 3. Applicant's reply has overcome the following rejection(s): All those under 35 USC 112 2nd Par., except regarding claim 15 where it improperly depends from 2 claims (see pg. 3, Final office action). Claims must depend in the alternative, only. See MPEP § 608.01(n).

Continuation of 5: Request for reconsideration does not place application in condition for allowance because:

- Applicants state that their product is formulated "for use" in foodstuffs, yet this is not specifically reflected in the claims. Simple recitation of an intended use of a product does not necessarily change the claimed product, and must result in a specific difference within said product.
- Applicant has provided no specific reason regarding the components of the preparation of McAuliffe, as to why this would not be considered a "food grade" preparation. Further, at such point, applicants' arguments would not be commensurate in scope with the claims, as the claims do not recite any particular components that would distinguish the invention over that of the reference.
- It is noted that claim 12 recites no additional components other than lacticin 3147, regardless of form.
- Applicants state that the product of Ryan et al. is not a "food-grade composition". This flies in the face of the teachings of the reference, as stated previously on the record, regarding the specific use of the freeze-dried lacticin 3147 powder preparation in foods.
- Applicants' arguments regarding the potential thermo-instability of the lacticin 3147 protein are not deemed persuasive for the reasons of record. The Office has provided legitimate resources, and specific facts and data, supporting the fact that lacticin 3147 was known to be heat stabile, and was not in any way suspected to be heat labile, as applicants suggest.
- Applicants' statements and presumption at page 10 of the response fail to find support. Applicants state that "the temperatures required to spray dry the fermentate of the present invention includes an inlet temperature of about 190 degrees C, and an outlet temperature of about 90 degrees C." However, this is (a) not claimed, and (b) not necessary to one of ordinary skill in the art to arrive at the claimed invention. Reference to DE 2616390 as cited in the rejection under 35 USC 103, specifically shows that the product was spray-dried at 87-97 degrees C, as stated previously on the record. Thus, spray drying at such elevated temperatures as applicant suggests, is unnecessary. Simply because applicant chose to utilize a higher temperature (again, not claimed), does not alter or make patentable the claimed invention.

KEITH HENDRICKS
PRIMARY EXAMINER